



allowed costs to be awarded. If there are any other genuine grounds of appeal, then leave of the Court of Appeal is not required. This depends on the interpretation of section 68 (1)(c) of the Courts of Judicature Act 1964 (CJA) which provides as follows:

***Section 68: Non-appealable matters.***

*(1) No appeal shall be brought to the Court of Appeal in any of the following cases:*

*(a)...*

*(b)...*

*(c) where the judgment or order relates to costs only, which by law are left to the discretion of the Court, except with the leave of the Court of Appeal; and*

*(d)...*

(Underline is mine)

2. The following is the question before us.

*“Whether the Court of Appeal was correct in law in the proper construction and meaning of Section 68 (1)(c) of the Courts of Judicature Act 1964 in construing the said section to encompass all matters pertaining to costs in the wider sense.”*

This was what James Foong JCA said in disallowing the appeal:

*“The Appellant’s attempt to convince us that the order of costs involves law and principle and that it is part of a larger appeal are all, but a smoke screen to hide the true character of the matter under appeal. For this, it is necessary for us to be vigilant against such attempt to blur our vision from only hearing appeals which are competent.”*

## **BACKGROUND FACTS**

3. I now backtrack to understand the brief background of the case, which is as follows.
  
4. A private limited company, Nadchatiram Realities (1960) Sdn. Bhd., was ordered to be wound up on 5<sup>th</sup> September 1988 pursuant to an order by the Seremban High Court Companies Winding Up Petition No: 42-02-1988. The Appellant is a contributor to that company. An Official Receiver was appointed as liquidator of the said company. The Appellant, in wanting to protect the piece of land belonging to the said company, lodged a private caveat over that land. The said caveat was successfully removed by way of an ex parte application by the liquidator. Thereupon, the Appellant filed a Summons-in-chambers [filed as Enclosure 209] to set aside the ex parte order. The Respondent (who is the 2<sup>nd</sup>

defendant in the winding up petition of the said company) opposed the Appellant's application.

5. Enclosure 209 was dismissed by the High Court at Seremban. Costs were awarded to the Respondent. A bill of costs amounting to RM350,000 for getting up fee was filed by the Respondent. The getting up fee was taxed down to RM250,000 by the Deputy Registrar. Discontented, the Appellant filed an application for the earlier mentioned review against the Deputy Registrar's decision.
6. While this was pending, the Appellant on 15.1.2002 wrote to the Chief Judge of Malaya complaining that the Deputy Registrar was bias or impartial. The Chief Judge of Malaya replied to say that the Appellant should formally apply for the Deputy Registrar's recusal. The Deputy Registrar, probably aware of the complaint, recused himself from hearing any matter connected to the Nadchatiram family.
7. The matter was subsequently transferred to Kuala Lumpur by an order of the Court dated 26<sup>th</sup> November 1996 and was re-registered in Kuala Lumpur as Kuala Lumpur High Court Winding Up Petition No: D5-21-179-2004. The order was only given effect on 3<sup>rd</sup> November 2004. It is not clear why this was done but in any case, it is not relevant to the issue before us.
8. While the application for a review against the Deputy Registrar's decision was still pending, the Appellant filed a summons-in-chambers (enclosure 256) at the High Court at Kuala

Lumpur to declare the hearing and decision on the bill of costs by the Deputy Registrar null and void and sought for it to be heard de novo before another Deputy Registrar of the High Court at Kuala Lumpur.

9. The learned Judge at the High Court at Kuala Lumpur dismissed enclosure 256 on 10<sup>th</sup> August 2005. In his decision, the learned Judge reasoned that the allegation of bias by the Deputy Registrar was without basis or merit. Such allegation should be used as the basis for the appeal within the stipulated time and not to be raised after the matter had been transferred to Kuala Lumpur three years later. The learned Judge was of the opinion that it was reasonable for the Deputy Registrar to fairly recuse himself because of the complaint letter sent to the then Chief Judge of Malaya and that there were indications that the counsel for the Appellant who appeared before the Deputy Registrar was rude in the sense that the Deputy Registrar was scolded, shouted and screamed at.
10. Dissatisfied with this decision, the Appellant appealed to the Court of Appeal.
11. The Court of Appeal reviewed the law on interpretation of the equivalent section 68(1)(c) CJA of England to which the Court of Appeal concluded that the appeal before it “relates to costs only and hence is not competent as leave to appeal has not been obtained”. Are they right in this conclusion?

12. Now, the Court has to decide whether on facts, the appeal is only as to costs or whether there are any other genuine grounds which the Appellant is appealing against. If the court holds on the facts that the Appellant is merely using the other grounds as a smoke screen in order to enable him to appeal on costs, then that appeal must be dismissed as leave had not been earlier obtained. In other words, was there a genuine appeal on substance? Was there a real basis to allege that the Deputy Registrar was bias? If there was, then the Appellant has the right to appeal without leave. The Appellant submit that since the Deputy Registrar was bias and impartial, he had not exercised proper judicial discretion.

## **THE LAW**

13. The following is the discussion on the law.

14. Where the trial judge in considering costs took into consideration materials which he should not have taken or based on facts which were not before him, then he can be said to have not exercised his discretion judiciously. In *Donald Campbell v Pollak*<sup>1</sup>, Lord Blanesburgh quoted the words of Lord Halsbury LC in *Civil Service Corporative Society, Ltd. V. General Steam Navigation Co., Ltd.*<sup>2</sup>:

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<sup>1</sup> [1927] All ER 1

<sup>2</sup> [1903] 2 K.B. 756 at 765

“No doubt where a judge has exercised his discretion upon certain materials which are before him, it may not be, and I think is not, within the power of the Court of Appeal to overrule that exercise of discretion. But the necessary hypothesis of the existence of materials upon which the discretion can be exercised must be satisfied. In the present case, so far as the evidence before me goes, I can see no materials whatsoever upon which the learned judge could exercise a discretion at all. ... That is not exercising a discretion upon materials properly before the judge; but it is depriving a litigant of rights of which he is by law possessed, upon grounds which it is not competent for the judge to treat as grounds for the exercise of his discretion. Under these circumstances I am of opinion that the cross-appeal must succeed, and that the defendants are entitled to their costs.”<sup>3</sup>  
(Emphasis mine)

15. Philmore J in *Westgate v. Crowe*<sup>4</sup> also said that if a party has been deprived of its costs on a ground not warranted in law, than that is a determination of the judge in point of law. If the judge had in deciding costs exceeded his jurisdiction, then that decision does not fall within the limitation set by section 68(1)(c). This means an appeal that relates to costs survives only if the judge exceeds his jurisdiction.

16. In the House of Lords decision of *Donald Campbell v Pollak*<sup>5</sup> Viscount Cave L.C. revealed in his judgment<sup>6</sup>:

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<sup>3</sup> Supra, at p 34

<sup>4</sup> [1908] 1 K.B. 24 at 27

<sup>5</sup> Supra, at p 9

“The result of my examination appears to me to be: (i) That there is no universal rule that an appeal as to costs only will not be entertained by this House, but the true rule is as stated by Lord Northington in *Cooper v. Scott* (11), by Lord Eldon in *Tod v. Tod* (1827), 2 Wils. & S. 542; 1 Bli.N.S. 639, HL, and by Lord Selborne in *Metropolitan Asylum District (Managers) v. Hill* (1880), 5 App. Cas. 582, as well as by Sir Joseph Napier in the Judicial Committee and by Lord St. Leonards and Lord Cranworth in the appeal committee; and accordingly (ii) that in this House, as in the Court of Appeal, an appeal from a discretionary order as to costs will not be received, except, perhaps, in cases where there is also a bona fide appeal on merits; but (iii) that when it is alleged that the Court of Appeal in dealing with costs has fallen into error on a point of law which governs or affects costs, an appeal on that question will be heard. There are (as will have been seen) many cases in which an appeal under those conditions has been entertained, and there is no case in which such an appeal has been held to be incompetent.”

17. Lord Atkinson<sup>7</sup> in the same case said that it is well established that when the decision of such a matter as the right of a successful litigation to recover his costs is left to the discretion of the judge who tried his case, that discretion is a judicial discretion. It has to be exercised on the facts of each case.

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<sup>6</sup> Supra, p 9

<sup>7</sup> Supra, p 20

18. In 1880, the House of Lords in the case of *Metropolitan Asylum District (Managers) v. Hill*<sup>8</sup> held that an appeal against the Court of Appeal's order to pay costs of the first trial as a condition for a new trial was not an appeal in respect of costs only and therefore ought to be entertained.

19. In *Metropolitan Asylum District (Managers) v. Hill*, Lord Watson said at page 586:

“I quite concede the propriety of the rule that the Court of last resort ought not to entertain an appeal which involves nothing except the payment of costs, but it appears to me that that rule is limited to the case where the whole merits of the action or cause have been determined, and where the Judges who have decided the cause have applied their minds to the right of the parties to receive an award of costs, looking to the whole circumstances and the conduct of the case; because it must be kept in view that the right to costs does not, in most cases, merely depend upon the merits of the cause as finally decided, but may, to a very great extent, depend upon the mode in which it has been conducted throughout by the parties. Accordingly, I think it would be out of the question to require that the Court of Appeal should investigate not only the merits of the cause but the whole of the proceedings in the cause ab initio, for the purpose of ascertaining whether the discretion of the Court below had been rightly or wrongly exercised.” (Underlining mine)

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<sup>8</sup> (1880) 5 App. Cas. 582

20. Lord Justice Bowen in the case of *In Re Bradford Thursby and Farish*<sup>9</sup>, in considering the issue as to whether the trial judge who awarded the costs had rightly decided that the solicitors against whom costs was awarded had been guilty of some misconduct or negligence said:

“Without fixing the precise limits to the exercise of the judge’s discretion, we are of opinion that on the question whether there has or not been misconduct or negligence by the solicitor there ought to be an appeal. ...”

21. It will be noted that these authorities were all pre-1925. The Courts of Judicature Act 1873 was subsequently repealed and substituted by the Supreme Court of Judicature Consolidation Act of 1925. As regards the interpretation of the section in the Supreme Court of Judicature Consolidation Act of 1925 Lord Denning MR in *Wheeler v. Sommerfield*<sup>10</sup> said:

‘The plaintiff appeals on that question of costs. It was said that he cannot appeal at all. The Supreme Court of Judicature (Consolidation) Act, 1925, s. 31 says:

“(1) No appeal shall lie ... – (h) without the leave of the court or judge making the order, from an order of the High Court or any thereof made with the consent of the parties or as to costs only which by law are left to the discretion of the court.”

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<sup>9</sup> [1884-1885] LR XV 635, at pages 636-637.

<sup>10</sup> [1966] 2 All ER 305

It was said that, seeing that in the result the plaintiff has failed on the substantive points, this appeal comes down to an appeal as to costs only and, therefore, it is prohibited without the leave of the trial judge.

I do not agree with that interpretation. As I have always understood this section of the Act of 1925, it means this: if a person makes no complaint against the judgment below except about the order for costs, then he must obtain the leave of the trial judge before he can come to this court. If he makes a complaint, however, not only about the costs, but also about other matters, then he can appeal both on those other matters and also on the costs; and the court has full jurisdiction to deal with them. Even if he fails on other matters, this court has jurisdiction to deal with the costs. His complaint on the other matters must, of course, be genuine. That is what has happened in this case. The plaintiff has brought genuine complaints of other matters. He has also complained about the costs. Although he has lost on the other matters, nevertheless his appeal as to costs stands. It is within the jurisdiction of the court to consider it.’

22. Harman L.J.<sup>11</sup> had this to say:

“... I think that the rule is as stated by Lord Denning, MR. It cannot be right to say that the question of jurisdiction to deal with the costs depends on whether the Appellant succeeds on some other issue in the action. Suppose he appeals on six points and he fails on five of them and there remains the sixth point, which is an appeal against the order

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<sup>11</sup> [1966] 2 All ER 305 at 311

as to costs. If the points that he has taken are genuine points, he can at the end appeal on the costs issue although his opponent has knocked out his other points one by one. If, of course, his appeal is as to the costs only or if the court should be satisfied that that is all he really intended to appeal about and has put in the other issues as a kind of “smoke screen”, it may be that the court will refuse to entertain the real object of the appeal, which is in truth against the order as to costs only. If there is a genuine appeal of substance, the fact that it fails does not make it impossible for the court to go on and deal with the costs, provided of course that they are discretionary costs. If the costs are, for instance, executor’s costs which are not discretionary, then the court does not have to look to see if there was leave below or not. That is the meaning of the words at the end of the rule about costs which are in the discretion of the court.”

23. That similar provision which appeared in section 49 of the English Supreme Court of Judicature Act 1873 and section 31(1)(h) of the Supreme Court of Judicature (Consolidation) Act 1925 has now been repeated in the new Supreme Court Act 1981 appearing as section 18(1)(f). In Malaysia, it would seem that similar provisions appeared in section 17(c) of the Courts Enactment of the Straits Settlement 1918.

24. Burton, AG. C.J. (Straits Settlements) in *Tan Thia Khwa and Cho Ban Hin Leong and Company v. Tan Ee Tong and Chop Eng*

*Huat*<sup>12</sup> also cited and followed *Donald Campbell v Pollak*<sup>13</sup>. In our Supreme Court in *Petroliam Nasional Berhad (Petronas) & Anor v. Cheah Kam Chiew*<sup>14</sup>, Hashim Yeop Sani SCJ also followed *Donald Campbell v Pollak*.

25. From this string of cases beginning from England and of course our own Straits Settlement and our Supreme Court judgments, it is clear that section 68(1)(c) CJA is to be read in the manner that has been given to the interpretation of the corresponding provisions in the English legislation. I have no hesitation in following that same interpretation.

26. The rationale behind section 68(1)(c) CJA, as well as the English equivalent, in my opinion, is not to disturb discretion exercised by judges, in so far as costs is concerned. This is only proper for otherwise parties will drag on the case merely because they do not agree to the award of costs.

27. The summary of the cases discussed above is that each ground of appeal raised must not be colourable and done with intent to color in order that the appellant could appeal on costs. In other words if the real reason for an appeal is to ask the appellate court to reconsider the order of the costs made (whether it is on

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<sup>12</sup> [1935] 4 MLJ 282

<sup>13</sup> Supra

<sup>14</sup> [1987] 1 MLJ 25

the question that costs should be ordered or on the amount of costs awarded) then that appeal shall not be allowed. The question of “whether the trial court has exercised its discretion properly” is not subject to appeal.

## **CONCLUSION**

28. Now let us look at the facts of the case before us. What has been pleaded is well spelt out earlier in this judgment. Basically, the Appellant is challenging the bias and impartiality of the Deputy Registrar who awarded the costs to the Respondent. I would not like to make any comment as to whether the costs awarded is properly exercised by the Deputy Registrar. But if the Deputy Registrar is found to be bias or impartial in coming to his decision, then of course his decision was not based on proper judicial discretion. His decision would therefore fall outside the scope of section 68(1)(c) CJA and the decision of the learned High Court Judge at Kuala Lumpur who heard enclosure 256 is appealable to the Court of Appeal without the need to first obtain leave.

29. A question of bias or impartiality is a question of fact and should not be disturbed at this level of appeal. The learned High Court Judge has already ruled that he found no merit or basis that the Deputy Registrar was bias. The Court of Appeal ruled that the issue on bias was but a smoke screen to hide the true character of the matter under appeal which is against costs. It is our finding

therefore that the Court of Appeal was right in dismissing the appeal from the High Court as no leave was obtained.

30. This appeal is dismissed with costs.

31. My learned brother Alauddin Dato' Mohd Sheriff, PCA has read this judgment in draft and he concurs with me.

Dated : 23<sup>rd</sup> February 2009

**ZAKI TUN AZMI**  
Chief Justice  
Malaysia

Counsel for the appellant: Malik Imtiaz Sarwar

Solicitors for the appellant: Satha & Co.

Counsel for the respondent: M. Stanislaus Vethanayagam

Solicitors for the respondent: Mahadevi Nadchatiram & Partners